United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1905.

No. 1534. 347

No. 10, SPECIAL CALENDAR.

FRANK W. PALMER, PUBLIC PRINTER, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

FILED MARCH 28, 1905.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1905.

No. 1534.

No. 10, SPECIAL CALENDAR.

FRANK W. PALMER, PUBLIC PRINTER, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 29, 1905.

In the Court of Appeals of the District of Columbia.

FRANK W. PALMER, Public Printer, Plaintiff in Error,
vs.
DISTRICT OF COLUMBIA. } No. 1534.

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a In the Police Court of the District of Columbia, February Term, 1905.

DISTRICT OF COLUMBIA
vs.
FRANK W. PALMER. } No. 266,566. Information for Violation of Law for the Prevention of Smoke.

Be it remembered, that in the police court of the District of Columbia, at the city of Washington, in the said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 In the Police Court of the District of Columbia, February Term, A. D. 1905.

DISTRICT OF COLUMBIA, *ss:*

Andrew B. Duvall, Esq., corporation counsel, by James L. Pugh, Jr., assistant corporation counsel, who for the said District of Columbia, prosecutes in this behalf by his proper person, comes here into court, and causes the court to be informed and complains that Frank W. Palmer, Public Printer, by due appointment, required by law to take charge of and manage the Government Printing Office, and the building hereinafter named, as the agent and occupant thereof, late of the District of Columbia, aforesaid, on the fourteenth day of February, in the year A. D. 1905, in the District of Columbia, and in the city of Washingtou, being then and there in the charge and management of the said Government Printing Office, and the building wherein the same is conducted; to wit, the building situated in square numbered six hundred and twenty-four (624), in the city aforesaid, in the District aforesaid, then and there owned by the United States of America, to which said building there is attached a smokestack and chimney used in connection with a certain stationary engine, steam boiler, and furnace in said building, the said Frank W. Palmer, as such agent and occupant, in charge

and management thereof as aforesaid, did then and there unlawfully cause, permit and allow the emission into the open air from the said smokestack and chimney, situated as aforesaid, certain thick and dense black and gray smoke, which was then and there a public nuisance, contrary to and in violation of an act of Congress for the prevention of smoke in the District of Columbia and for other purposes approved February 2, 1899, and constituting a law of the District of Columbia.

ANDREW B. DUVALL,
Corporation Counsel,
By JAMES L. PUGH, JR.,
Assistant Corporation Counsel.

Personally appeared F. L. Wollard, this 21st day of February, A. D. 1905, and made oath before me that the facts set forth in the foregoing information are true, and those stated upon information received, he believes to be true.

[Seal Police Court of District of Columbia.]

JOSEPH Y. POTTS,
Clerk Police Court, D. C.

[Endorsed:] No. 266,566. Information. D. C. *vs.* Frank W. Palmer. Violation of smoke law. Witness, F. W. Wollard, inspector.

2 In the Police Court of the District of Columbia, 14th Day of March, 1905.

THE DISTRICT OF COLUMBIA
vs.
FRANK W. PALMER, Public Printer. } No. 266,566.

Comes now the defendant, and for plea to the information filed herein says that at the time of the commission of the alleged nuisance therein charged, he was, and for a long time prior thereto, viz: since the 3rd day of April, 1897, had been a public officer of the United States of America, that is to say, Public Printer, duly nominated by the President, and by and with the advice and consent of the Senate appointed to said office, and that he was at the time of the commission of said alleged nuisance, and during the entire period of his incumbency has been by law required to submit to each regular session of the Congress of the United States an estimate of materials, including fuel, for use in the public business in the operation of the Government Printing Office for the next ensuing fiscal year, and that he was at the time of the commission of the alleged nuisance aforesaid, and during the entire period of his incumbency had been further required by law to prepare and submit to a standing committee of both houses of Congress, called

"Joint Committee on Public Printing" a schedule of materials, including fuel, required to be purchased, for use in the public service as aforesaid, showing the description, quantity and quality of each article, including fuel, and to invite proposals therefor, under the direction of said committee, and to return to the said committee his action in the premises; and that at the time
of the commission of the alleged nuisance he was, and
3 during the entire period of his incumbency aforesaid had
been further required by law to report to the Congress on the first day of each regular session a detailed statement of all proposals and contracts entered into for the purchase of said materials, including fuel, for use in the public service as aforesaid, and to further report at the same time all payments made during the preceding year under his direction; and that the said Congress has during the whole period aforesaid, and acting upon the estimates submitted by him as aforesaid, and upon the reports so made by him as aforesaid to the Congress and the said Joint Committee on Printing, annually appropriated for bituminous or soft coal as fuel for use in the said Government Printing Office, and that purchases of bituminous or soft coal, and the contracts therefor, and the expenditures of public moneys on that account have been duly, regularly and annually reported by this defendant, as by law required, as well to the said Congress, as to the said Joint Committee on Public Printing, and that at the time of the commission of the alleged nuisance aforesaid, and during the entire period of his incumbency, the defendant in the discharge of his duties as such public officer, used due care and prudence in the consumption of such fuel and bituminous coal in carrying on the work of the said United States upon the premises described in the said information, which said premises are solely owned, used and occupied by the United States, and are used, owned and occupied by no other person, body politic or corporation; and that notwithstanding such due care and prudence in the use of such coal as aforesaid, there was emitted into the open
air through a smoke-stack or chimney attached to said prem-
4 ises, and used in connection with a certain stationary engine,
steam boiler and furnace therein, certain thick and dense black and gray smoke: *Without this*, that the said defendant as agent and occupant of said building, in charge and management thereof, did then and there, as in said information charged, permit and allow the emission into the open air, from said smoke-stack or chimney, certain thick and dense black and gray smoke, which was then and there a public nuisance, in manner and form as in said information charged: and this said defendant is ready to verify.

MORGAN H. BEACH,
A. R. MULLOWNEY,
Attorneys for Frank W. Palmer.

[Endorsed:] No. 266,566. District of Columbia *vs.* Frank W. Palmer. Special traverse of defendant. M. H. Beach, A. R. Mullowney, att'ys for defendant.

5 In the Police Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
FRANK *B.* PALMER. } No. 266,566.

And, Andrew B. Duvall, corporation counsel, who prosecutes in this behalf for the said District of Columbia, by James L. Pugh, assistant corporation counsel, as to the plea of the said Frank W. Palmer by him above pleaded, says that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said District of Columbia from prosecuting the said information against him the said Frank W. Palmer; and that the said District of Columbia is not bound by the law of the land to answer the same; and this the prosecutor aforesaid is ready to verify; wherefore, for want of sufficient plea in this behalf, the said prosecutor for the said District of Columbia prays judgment, and that the said Frank W. Palmer may be convicted of the premises in the said information specified.

ANDREW B. DUVALL,
Corporation Counsel,
By JAMES L. PUGH, JR.,
Assistant Corporation Counsel.

[Endorsed:] No. 266,566. District of Columbia *vs.* Frank W. Palmer. Demurrer to plea.

6 In the Police Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
FRANK W. PALMER. } No. 266,566.

Now comes the defendant, Frank W. Palmer, and joins issue upon the demurrer filed herein to the defendant's plea.

MORGAN H. BEACH,
A. R. MULLOWNY,
Attorneys for the Defendant.

7 In the Police Court of the District of Columbia, on the 14th Day of March, 1905.

THE DISTRICT OF COLUMBIA
vs.
FRANK W. PALMER, Public Printer. } No. 266,566.

Now comes the Attorney-General of the United States, and suggests to the court, and gives it to understand and to be informed

(appearing only for the purpose of this motion), that the property upon which the nuisance alleged in the information to exist is the property of the United States, and is held, occupied, possessed and controlled by the United States, and is not held, occupied, possessed or controlled by any other person, body politic or corporate, and that the defendant in this case, Frank W. Palmer, Public Printer, is a public officer of the said United States, duly nominated by the President, and by and with the advice and consent of the Senate appointed to the said office, and that the said Public Printer is not the owner, agent, lessee or occupant of the said property.

Wherefore, without submitting the rights of the Government of the United States to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject in
8 controversy, he moves that the information be set aside, and all proceedings thereunder be stayed and dismissed, and for such order as may be proper in the premises.

WILLIAM H. MOODY,
Attorney-General of the United States.

MORGAN H. BEACH,
U. S. Attorney, D. C.

9 In the Police Court of the District of Columbia.

DISTRICT OF COLUMBIA
vs.
FRANK W. PALMER, Public Printer. } No. 266,566.

Be it remembered that at the trial of this case, on the 23d day of March, A. D. 1905, before Honorable Charles F. Scott, one of the judges of said police court, upon the information, the special traverse, the demurrer thereto, the issue joined thereon, and the suggestion of the Attorney General of the United States, the defendant moved the court upon the pleadings to discharge the defendant, but the court refused to so rule, and sustained the said demurrer, and, the defendant electing to stand upon his said plea, the court adjudged the defendant guilty as charged in the information, and imposed upon the said defendant a fine of fifty dollars, and adjudged that in default of payment he be imprisoned in the jail of the District of Columbia for sixty days; to which refusal, ruling, judgment and sentence counsel for the defendant then and there severally excepted, and said exceptions and each of them were duly noted upon the minutes of the court, but the court passed judgment in the said case, and notice was then and there given in open court of the intention of the defendant to apply for a writ of error to the Court of Appeals of the District of Columbia.

And the defendant prays the court to sign and seal this, his bill of exceptions, and to make the same a part of the record, to have

the same force and effect as to each and every of said exceptions taken by the defendant and noted by the court as aforesaid as if the same had been embodied in separate bills of exceptions and signed and sealed by the judge at the trial, which prayer is granted, and accordingly the judge presiding at the trial signs and seals this, the said bill of exceptions to have the force and effect aforesaid, now for then, this 25th day of March, A. D. 1905.

CHARLES F. SCOTT, [SEAL.]
Judge of the Police Court, D. C.

(*Copy of Docket Entries.*)

In the Police Court of the District of Columbia.

DISTRICT OF COLUMBIA
vs.
FRANK W. PALMER. } No. 266,566. Information for Violation of Law for Prevention of Smoke.

Defendant arraigned Monday, February 27, 1905. Plea: Not guilty. Jury trial demanded. Continued to March 20, 1905.

March 20, 1905.—Plea of not guilty and demand for jury trial withdrawn. Special traverse of defendant filed. Demurrer to defendant's special traverse filed. Joinder of issue on demurrer. Continued to March 23, 1905.

March 23, 1905.—Suggestion of Attorney General of the United States filed. Continued to March 24, 1905.

March 24, 1905.—Upon issue joined demurrer to special traverse sustained and defendant adjudged guilty.

Sentence: To pay a fine of fifty dollars, and, in default, to be committed to jail for the term of sixty days.

Exceptions taken to the rulings of the court on matters of law and notice given by defendant in open court at the time of the several rulings of his intention to apply to a justice of the Court of Appeals of the District of Columbia for a writ of error.

Personal recognizance in the sum of one hundred dollars entered into on writ of error to the Court of Appeals of the District of Columbia upon the condition that in the event of the denial of the application for a writ of error, the defendant will, within five days next after the expiration of ten days, appear in the police court and abide by and perform its judgment, and that in the event of the granting of such writ of error, the defendant will appear in the Court of Appeals of the District of Columbia and abide by and perform its judgment in the premises.

March 25, 1905.—Bill of exceptions filed, settled and signed.

Writ of error received from the Court of Appeals of the District of Columbia.

12 In the Police Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

I, Joseph Y. Potts, clerk of the police court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 11 inclusive, to be true copies of originals in cause No. 266,566, wherein The District of Columbia is plaintiff and Frank W. Palmer defendant, as the same remain upon the files and records of said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, — the city of Washington, in said District, this 28th day of March, A. D. 1905.

[Seal Police Court of District of Columbia.]

JOSEPH Y. POTTS,
Clerk Police Court, Dist. of Columbia.

13 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Charles F. Scott, judge of the police court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said police court, before you, between The District of Columbia, plaintiff, and Frank W. Palmer, Public Printer, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 15 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Seth Shepard, Chief Justice of the said Court of Appeals, the 25th day of March, in the year of our Lord one thousand nine hundred and five.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

Chief *Justice of the Court of Appeals of the District of Columbia.*

[Endorsed:] Filed, Mar. 25 1905. Joseph Y. Potts, clerk police court D. C.

14 Filed Mar. 28, 1905. Joseph Y. Potts, Clerk Police Court, D. C.

In the Police Court of the District of Columbia.

DISTRICT OF COLUMBIA
vs.
FRANK W. PALMER, Public Printer. } No. 266,566.

To the clerk of the police court.

SIR: In preparing the transcript for the Court of Appeals in this case you will please include therein the following:

1. The information.
2. The special traverse.
3. Demurrer thereto.
4. Joinder of issue on demurrer.
5. Suggestion of the Attorney General.
6. Judgment of the court.
7. Bill of exceptions.
8. All the docket entries in this court.
9. Opinion of the court, if filed.
10. Writ of error.

MORGAN H. BEACH,
Attorney of the United States in and for the District of Columbia, Attorney for Defendant.

Endorsed on cover: District of Columbia police court. No. 1534. Frank W. Palmer, Public Printer, plaintiff in error, *vs.* District of Columbia. Court of Appeals, District of Columbia. Filed Mar. 28, 1905 Henry W. Hodges, clerk.

Court of Appeals, District of Columbia.

APRIL TERM, 1905.

No. 1534.

No. 10, SPECIAL CALENDAR.

FRANK W. PALMER, PUBLIC PRINTER, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

SUPPLEMENTAL BRIEF OF MR. BEACH FOR APPELLANT.

MORGAN H. BEACH,
For Appellant.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 15819

Court of Appeals, District of Columbia.

APRIL TERM, 1905.

No. 1534.

No. 10, SPECIAL CALENDAR.

FRANK W. PALMER, PUBLIC PRINTER, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

SUPPLEMENTAL BRIEF OF MR. BEACH FOR APPELLANT.

PROPOSITION I.

A thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.

Holy Trinity Church *vs.* U. S., 143 U. S., p. 459.

PROPOSITION II.

General statutes do not bind the Sovereign unless expressly mentioned in them.

Corollary: Municipal ordinances *a fortiori* do not bind the Sovereign.

The general business of the legislative power is to establish laws for the individual, not for the Sovereign; and when the rights of the Commonwealth are to be transferred or affected the intention must be plainly expressed and necessarily implied (Jones *vs.* Tatham, 20 Pa. St., pp. 398–411).

Judge Story in United States *vs.* Hoar, 2 Mason, p. 311, speaks of "the safe rule founded in the principles of the common law that the general words of a statute ought not to include the Government or affect its rights, unless that construction be clear and indisputable upon the text of the act."

Cited and approved in State *vs.* Milburn, 9 Gill, p. 105.

To the same effect:

Cole *vs.* White, 32 Ark., p. 45.

"It is a known and firmly established maxim that general statutes do not bind the Sovereign unless expressly mentioned in them."

State *vs.* Garland, 7 Ired. L. (N. C.), p. 48.

Government not liable to attachment.

Buchannan *vs.* Alexander, 4 How., p. 20.

Nor to statute of limitations.

U. S. *vs.* Ry. Co., 118 U. S., p. 125.

Nor can laches be imputed to the Government.

U. S. *vs.* Insley, 130 U. S., p. 263.

Stanley *vs.* Schwalby, 147 U. S., p. 508.

Nor to costs.

People *vs.* Gilbert, 18 Johnson, p. 227.

Williams *vs.* D. C., 22 D. C. App., p. 471:

As to deputy marshal executing process not liable to violation of regulation against obstructing sidewalks.

"We should discard any construction (of the statute) "which would lead to absurd consequences. We ought, "rather, to be 'curious and subtle to invent reasons and "means' to carry out the clear intent of the law-making "power when thus expressed.

"A thing which is within the intention of the makers of "the statute is as much within the statute as if it were within "the letter, or a thing which is within the letter of the stat- "ute is not within the statute unless it be within the mean- "ing of the makers."

Suckley *v.* Furse, 15 Johnson, p. 338.
People *v.* Ins. Co., 15 Johnson, 357.
Oates *v.* Nat. Bank, 100 U. S., p. 239.

MORGAN H. BEACH,
For Appellant.

MAY 1, 1905.

Court of Appeals, District of Columbia.

MAY TERM, 1905.

No. 1534.

No. 10, SPECIAL CALENDAR.

FRANK W. PALMER, PUBLIC PRINTER, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

BRIEF FOR DISTRICT OF COLUMBIA, DEFENDANT IN ERROR.

ANDREW B. DUVALL,
EDWARD H. THOMAS,
Attorneys for Defendant in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 15806

Court of Appeals, District of Columbia.

MAY TERM, 1905.

No. 1534.

SPECIAL CALENDAR, No. 10.

FRANK W. PALMER, PUBLIC PRINTER, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

The statute under which this prosecution was instituted is entitled "*An act for the prevention of smoke* in the District of Columbia, and for other purposes," and was passed February 2, 1899 (30 Stats., 812), and is as follows:

"*Be it enacted, etc.*, That on and after six months from the passage of this act the emission of dense or thick black or gray smoke or cinders from any smokestack or chimney used in connection with any stationary engine, steam boiler, or furnace of any description within the District of Columbia shall be deemed, and is hereby declared, to be a public nuisance:

"*Provided*, That nothing in this act shall be construed as applied to chimneys of buildings used exclusively for private residences.

"SEC. 2. That the owner, agent, or lessee, or occupant of any building of any description, from the smokestack or chimney of which there shall issue or be emitted thick or dense black or gray smoke or cinders within the District of Columbia on or after the day above named shall be deemed and held guilty of creating a public nuisance and of violating the provisions of this act.

"SEC. 3. That any person or persons violating the provisions of this act shall, upon conviction thereof before the police court of the District of Columbia, be punished by a fine of not less than ten dollars nor more than one hundred dollars for each and every offense; and each and every day wherein the provisions of this act shall be violated shall constitute a separate offense.

"SEC. 4. That in order to provide for the enforcement of the provisions of this act there shall be detailed from time to time by the Commissioners of the District of Columbia an inspector or inspectors of the health department of the District of Columbia, whose duty it shall be, under the supervision of the health officer of the District of Columbia, to cause to be prosecuted all persons violating the provisions of this act.

"SEC. 5. That no discrimination shall be made against any method or device which may be used for the prevention of smoke and which accomplishes the purpose of this act.

"SEC. 6. That all acts or parts of acts inconsistent herewith be, and the same are, hereby repealed."

The information avers that the plaintiff in error here (defendant below) was, by due appointment as Public Printer, required by law to take charge of and manage the Government Printing Office and the building named in the information,

to which there is attached a smokestack and chimney used in connection with a certain stationary engine, steam boiler, and furnace therein, and that such defendant, as agent and occupant of the building, in charge and management thereof, permitted the prohibited nuisance.

The special plea, which is one of confession and avoidance, sets up the defenses that—

(*a*.) The defendant, as Public Printer, was required to submit to Congress an estimate of fuel, and to a standing committee of both houses of Congress, called "Joint Committee on Public Printing," and to invite proposals therefor under the direction of such committee, and that Congress has, during his incumbency, acted upon his estimates and reports and annually appropriated "for bituminous or soft coal as fuel for use in the said Government Printing Office," and that "the defendant, in the discharge of his duties as such public officer, used due care and prudence in the consumption of such fuel and bituminous coal in carrying on the work of the said United States upon the premises described," and,

(*b*.) That "said premises are solely owned, used, and occupied by the United States" and by no other person.

By act of Congress approved January 12, 1895 (28 Stat., 601; 2d Sup., 340), it was provided by section 17 that the President should nominate, to be confirmed by the Senate, a suitable person, who must be a practical printer, "to take charge of and manage the Government Printing Office."

Among his duties are:

Section 18, to purchase all materials and machinery which may be necessary for the Government Printing Office.

By section 22 the Public Printer is required on the first day of each regular session to report to Congress, among other things, a classified detailed statement of the number of hands and the sums paid each.

Section 32 requires him to charge himself with, and be accountable for, all material received for the public use.

Section 43 requires him, on the first day of July in each year in which a new Congress is to assemble, to cause to be filed in the Department of the Interior a full and complete list of all officers, agents, clerks, and employees employed in his Department.

Counsel for the defendant argued in the police court that the defendant was not an agent or occupant of the premises within the statute; that if he was such occupant or agent, yet, the plea having averred that he acted with care and caution in the consumption of bituminous coal, provided in the manner indicated in the plea, no liability attached; and, thirdly, the statute being penal, passed for municipal purposes, that the police court had no jurisdiction to try the defendant for an offense against the United States upon a public reservation in a public building owned by the United States.

ARGUMENT.

The use of soft or bituminous coal is not allowable under the statute if thereby the prohibited smoke is emitted.

In Moses *vs.* U. S. this court said:

"Congress, it must be presumed, inquired into and duly considered the effect, present and prospective, of the continued emission, constantly, or at intervals, of dense black or

gray smoke, upon those public interests in respect of safety, comfort and cleanliness.

"And it must also be presumed that it apprehended and duly considered the probable injury to, or burden upon, private property, in such use, through the increased expense that may be involved in the use of smoke-consuming appliances, or, *in case of their inefficiency, in the substitution of smokeless coal, coke, or other fuel, for soft, bituminous coal which produces the objectionable smoke.*

"The policy of adopting a regulation to meet the conditions is a matter peculiarly and exclusively within the province of the legislative department."

Moses *vs.* U. S., 16 App. D. C., 438.
Bradley *vs.* D. C., 20 App. D. C., 172.

II.

The plea in this case does not aver that any smoke-consuming devices were used at the Government Printing Office, nor more than that due care and prudence was used in the consumption of bituminous coal; and therefore it does not appear that the defendant could have prevented the nuisance.

In Bradley's case, above noted, the defendant offered to prove that there was no known device, machine, or method to be used in connection with either hard, soft, or mixed coals or other materials which would cause combustion without emitting any smoke whatever, and that it was physically impossible to comply with the terms of the act of Congress. Assuming that the same rule must be applied to all persons who are charged with the violation of the act of Congress, it is submitted that the Public Printer is liable, because he has failed to aver the condition of the furnace

and smokestack, and that he had used smoke-consuming devices. In Bradley's case this court said:

"It was not even proposed to show that the furnace in question was of skillful, modern construction, and supplied with a proper smokestack, or that an improved smoke-consuming device had been attached to it, much less that reasonable and satisfactory experiments had been made with different kinds of ordinary fuel in an attempt to comply with the law."

Bradley *vs.* D. C., 20 App. D. C., 175.

III.

The agent and occupant applies to the superintendent or manager of the building, and therefore applies to the defendant, who is required by law, as alleged in the information, "to take charge of and manage the Government Printing Office."

The situation stated in this proposition is admitted by the plea. In Sinclair *vs.* D. C. it appeared that the defendant was superintendent of and had supervision over various power-houses of the electric lighting company, and that the offense charged was in respect to one of the power-houses located on B street between Thirteen-and-a-half and Fourteenth streets, and embraced a number of structures, in one of which, number 213, the defendant had his office and desk. The court had refused to instruct the jury that if there was no smokestack on the building number 213 Fourteenth street their verdict should be for the defendant. This court said:

"Looking at the general purpose and scope of the act, it is reasonably clear that the general term 'building,' was

intended to include all the contiguous structures occupied and used in the prosecution of one general business use or purpose. Unquestionably, too, if a natural person, as owner or lessee, conducted the same business upon the same premises as described in the testimony, he would be liable as owner, or occupant, whether he had his private business office in a separate house on the premises, or even if he had no such private office at all. And if the same business were carried on by a general representative of a distant owner, such representative would be liable as occupant and agent under the same circumstances.

"As the premises and business belong to a corporation, it could only act, in its operation, through representatives and agents.

"That the defendant was the general managing representative and agent of the corporation in the conduct of the business is put beyond question by the evidence."

In the same case the court had instructed the jury that if the defendant had control of the premises he was an occupant; that if the defendant, as superintendent, had an agency in the control of the furnaces producing the smoke or as such agent had control of the engineer or other person who operated the same, then he was guilty, and these instructions were affirmed by this court.

Sinclair *vs.* D. C., 20 App. D. C., 336, 340, 343.

IV.

The act of Congress makes no discrimination in terms between agents and occupants of private and public property, and such discrimination would tend to make the law unconstitutional.

It has been objected to the operation of the act of Congress that the nuisance is not made to depend upon the

locality of the smokestack or the proximity thereto of other buildings or residences; that if it be produced by a stationary engine in any other building than a private residence it is declared to be a public nuisance, while the same smoke produced from a private residence is not so declared; that under the operation of the act two buildings might be standing side by side, one a private residence and the other an apartment house or office building, both of which were emitting precisely the same kind of smoke, and yet the owner of one would be guilty, while the owner of the other would be innocent. To these objections we have the additional one against the validity of the law, presented by this defendant in this case, to the effect that without express words so declaring public buildings and public agents are exonerated, even though the nuisance exists.

V.

The defendant, even though he be a public officer, is liable for violation of the smoke law.

The fact that Congress appropriates money for the purchase of supplies on estimates made by the Government Printer, and in accordance with the character of fuel that he asks to have supplied to him, is no excuse for him. Congress also appropriates money for the purchase of arms and powder for the militia, and yet that would not authorize the militia to fire cannons in the streets of this city contrary to the police regulations of the municipality; neither does the issue of an internal-revenue license by the National Government authorize the sale of intoxicating liquors by such

licensee without obtaining a license, as required by the act of Congress in the District of Columbia for the sale of such liquors. Among the instances where public officials have been held liable are the following:

Trover will lie in a State court against a United States postmaster for an illegal detention of a newspaper from the party to whom it is addressed, under the color of the postal laws and regulations of the United States.

Teal *vs.* Fenton, 1 N. Y., 543.

In Jones *vs.* Seward (40 Barber, 563) it was decided that an action for false imprisonment would lie in the State court against the Secretary of State of the United States.

It is said in Marbury *vs.* Madison, 1 Cranch, 170:

"If one of the heads of departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding and being compelled to obey the judgment of the law."

Id., 170.

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.

"It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy and to observe the limitations which it imposes upon the exercise of the authority which it gives."

U. S. *vs.* Lee, 106 U. S., 196.

Where one who claims to be an officer of the Government invades the personal and property rights of individuals and is sued as an individual, the jurisdiction of the court is not ousted because he asserts authority as an officer. He must show that his authority is sufficient in law to protect him.

Hagood *vs.* Southers, 117 U. S., 52.
Poindexter *vs.* Greenhow, 114 U. S., 270.
U. S. *vs.* Tweed, 16 Wall., 504.
The Monte Allegre, 9 Wheat., 616.
U. S. *vs.* Lee, 106 U. S., 196.

The Government does not guarantee the integrity of its officers, but leaves all who are wronged by such officers their rights of action against them.

Moffat *vs.* U. S., 112 U. S., 24.
Gibbons *vs.* U. S., 8 Wall., 269.

Other instances, perhaps innumerable, of liability of public officers for torts or wrongs, done ostensibly under cover of office, might be added. Public officers, too, are criminally liable for violation of criminal statutes, even while discharging their duty. This is because no officer or employee of the United States is placed by his position, or the services which he is called upon to perform, above responsibility to the legal tribunals of the country.

U. S. *vs.* Kirby, 7 Wall., 482.

The act of Congress prohibiting the stoppage of the mail is not to be construed to prevent the arrest of the driver of a carriage transporting the mail when he is driving through

a crowded city at such a rate as to endanger the lives of the inhabitants.

U. S. *vs.* Hart, Pet. C. C., 390.

S. C., 3 Wheeler's Crim. Cas., 304.

Restricting speed of trains to five miles an hour by city ordinances does not conflict with act relative to willful obstruction of mail-carriers.

5 Op. Att'y Gen., 554.

A mail-carrier, although he may not, while in discharge of his duty, be detained upon any civil suit, is legally liable to arrest on a charge *of any criminal offense as a violation of the law against the sale of liquor.*

Penny *vs.* Walker, 64 Me, 430.

S. C., 18 Am. Rep., 269.

U. S. *vs.* Kirby, 74 U. S., 278; notes.

Both Corporation and Officers Indictable.—Where a corporation maintains a public nuisance, the officers of the corporation, as well as the corporation itself, may be properly indicted.

People *vs.* Detroit White Lead Works, 82 Mich., 471.

14 Ency. Pl. & Pr., 1102, 1103.

"All the defendants were properly convicted. The officers of the company are jointly responsible for the business. It is not necessary to conviction that they should have been actually engaged in work upon the premises. The work is carried on by employees. The directors and officers are the persons primarily responsible, and therefore the proper ones to be prosecuted."

82 Mich., 479.

"If the act is in excess of the power given, or if it is done in a manner not within the reasonable contemplation of the legislature, to be gathered from a fair construction of the grant as if it were not a necessary and probable result of the exercise of the power given, the act will be no protection against liability, both civilly and criminally. It is only against such consequences are are fairly within the contemplation of the legislature in conferring the authority, and such results as are necessary incidents to its being done. In other words, such results as are the natural and probable consequences of and exercise of the power at all, that the grant operates as a protection."

2 Wood, Nuisances, p. 1058.

This court has said, in holding the District of Columbia responsible for a nuisance committed by its agents, that the maintenance of a nuisance is not a governmental function; that the performance of public duties does not require the perpetration of a nuisance; that the unlawful maintenance of a nuisance on the property of a municipality renders the municipality liable to one specially injured. In this connection the court stated:

"The District of Columbia, therefore, is the owner of this stable; it owns the lot on which the building stands; and it is the owner of the building constructed thereon. That lot and building it is required to make suitable for the accommodation of the police force, or for the branch of the police force to be harbored there. And, plainly, the duty does not cease with the construction of the building, for the property does not pass beyond its control. The duty is equal to keep it in proper condition and to provide for its being suitable in the first instance. It is not pretended that the District of Columbia has lost the control of these premises. It has not rented or leased them.

It has retained and must retain them for the use and benefit of the police force, and it must keep them in proper condition for that use. This necessarily implies that it must not permit them to become a nuisance, injurious to the health and comfort of the community.

"Some argument has been based upon the theory that a municipality cannot be held liable at the suit of a private person for the failure to perform a public duty, when it receives no profit or special advantage to itself from the performance of such public duty. But the matter of profit or absence of profit has no place in the present case. The municipality owning property stands in no different position from a natural person in respect of the duty not to permit it to become a nuisance."

Roth *vs.* D. C., 16 D. C., 323, 327.

The argument was made in the court below that the Public Printer was commanded by law to do the very thing for which he was now being prosecuted. The premises for this proposition do not exist. There is and was no act of Congress which required the Public Printer to commit this nuisance, nor is there a sufficient allegation to show, nor will the court assume, that a public nuisance must exist from the mere use of bituminous coal. We also submit that the smoke law cannot be said to have been repealed by the mere suggested implication that appropriations for soft coal at the Government Printing Office except that office and building from the operation of the smoke law.

VI.

The act of Congress approved February 2, 1899 (30 *Stat.*, 812), *declares that the emission of certain smoke from certain chimneys "within the District of Columbia shall be deemed, and is hereby declared, to be a public nuisance. Provided, That nothing in this act shall be construed as applying to chimneys used exclusively for private residences."*

The statute declares an offense; and having enumerated the buildings exempt from its operation, the maxim, expressio unius est exclusio alterius, applies.

This act of Congress has been, by repeated decisions of this court, liberally construed for the purpose of attaining the object which the legislature had in its enactment. Recently, in Duehay *vs.* D. C., the courts have held that an appartment house is not a private residence within the meaning of the law. In the Moses case, above quoted, in the Bradley and in the Sinclair cases, this court has held the same way. This court has denied that the act is void because it does not give equal protection of the law, and it has refused to permit evidence to be given that it is physically impossible to comply with the law. Such being the course of judicial decision in this matter, we respectfully submit that the court will not now read into the act an exception in favor of the defendant in this case; nor will the court hold, we believe, that the act has been repealed because of the action of any joint committee of Congress upon the estimates of the Public Printer. These estimates and this course of business existed at the time of the enactment of this statute, and if Congress had

intended to exempt the public buildings, including the Government Printing Office or the Public Printer, it would have been easy to have so stated in the law itself; and that Congress did not do so, when the situation is the same as it now is and was when this prosecution was instituted, seems to us to be clear evidence that there was no legislative intent to exonerate Government buildings from the application of the smoke law.

In Railroad *vs.* D. C. railroad charters had provided that Congress reserve to itself power to regulate the speed of trains within the District of Columbia. The District Commissioners, without any authority other than the act of Congress conferring upon them the authority to make certain police regulations, passed certain regulations limiting the speed of trains and requiring them in certain instances to come to a full stop. Here was a distinct interference by a municipality with an authority expressly reserved to Congress. Yet this court held that the regulations were valid.

Railroad *vs.* D. C., 10 App. Cases D. C., 111.

Much more must an act of Congress prohibiting smoke be declared to be unrepealed and valid where no subsequent act in terms or by fair implication has been passed creating an exception which does not exist in the act itself. It is supposed by counsel for the defendant, and they urged it in the court below, that the case of Page *vs.* D. C. was authority to show that the smoke law did not apply to governmental buildings. The cases are not parallel. The restaurants at the Capitol had been in use and operation a half a century when the license law was enacted, and these restaurants were occupied primarily for the use and con-

venience of members of Congress. The court held that it was not the intention of Congress to declare these restaurants common bar-rooms nor to subject them to the examination and inspection of the excise board, and to render the selection made by the committees of Congress of persons who were to keep these restaurants void and defeat them by refusal to issue the license. In addition, the liquor license law was purely a municipal matter, regulating the sale of intoxicants.

It is respectfully submitted that the judgment of the police court should be affirmed.

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